Field Bridge Associates *and* Local 32B-32J, Service Employees International Union, AFL–CIO

Rachel Bridge Corp. *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Cases 29–CA–13582, 29–CA–13788, 29–CA–13720 (formerly 2–CA–23014), and 29–CA–14230

February 14, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 22, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs. Respondent Field Bridge filed cross-exceptions and a supporting brief. Respondents Field Bridge and Rachel Bridge filed a brief in opposition to the exceptions. The Union filed an answering brief to Respondent Field Bridge's cross-exceptions. Thereafter, the Respondent filed a motion to reopen the record, and the General Counsel and the Union filed statements in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to deny the Respondent Field Bridge's motion to reopen the record,[1] and to adopt the recommended Order.

We adopt the judge's finding that neither Field Bridge nor Rachel Bridge assumed the existing Realty Advisory Board on Labor Relations (RAB) contract. We find no merit in the contentions of the General Counsel and the Union that the New York State courts' contrary findings are binding upon us.

Pursuant to the New York Civil Practice Law and Rules, Field Bridge sought to quash arbitration proceedings instituted by the Union concerning incidents which occurred prior to Field Bridge's assuming ownership of Ebbet's Field. In an oral ruling (there was no written opinion), Judge Ira Grammerman of the Supreme Court of the State of New York found that Field Bridge assumed the RAB agreement. The Court observed that ''there were [sic] some administrative foulup, in that the document under which you [Field Bridge] had specifically assumed the agreement was never . . . signed or not presented because of what appears to be a rather complicating closing. And somebody just missed the boat.'' The Appellate Division affirmed, and the court of appeals refused permission to appeal. In a separate proceeding, Judge Grammerman's ruling was found to be binding on Rachel Bridge.

The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. *Allbritton Communications*, 271 NLRB 201, 202 fn. 4 and sources cited (1984), enfd. 766 F.2d 812 (3d Cir. 1985). Underlying this rule is the long-recognized principle that ''Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.'' *Amalgamated Utility Workers v. Consolidated Edison Co*., 309 U.S. 261, 265 (1940). See also *National Licorice Co. v. NLRB*, 309 U.S. 350, 362–364 (1940); Section 10(a) of the Act (the Board's power to prevent unfair labor practices ''shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .''). Thus, the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties. A number of

[1] The motion to reopen the record cites a July 9, 1991 article in New York Newsday (Brooklyn Edition) in which Shop Steward Oakley Harvey stated that: ''Maintenance workers [at Ebbet's Field] walked off the job in support of security guards who went on strike to protest management's refusal to pay benefits . . . .'' Respondent Field Bridge argues that had Harvey made this statement at the hearing and been credited by the judge, the judge would have found that the strike at Ebbet's Field was for the unlawful purpose of forcing Field Bridge to recognize and bargain with the Union for a unit of guards and nonguards.

The General Counsel and the Union argue that because the Respondent failed to call or subpoena Harvey to testify at the hearing, this newly proffered evidence does not satisfy the Board's Rules and Regulations, Sec. 102.48(d)(1), which states, in pertinent part, that:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

We find merit in the General Counsel's and the Union's contentions. The evidence that the Respondent proposes to offer does not satisfy the Board's Rules. The Respondent failed to secure Harvey's testimony at the hearing in presenting its affirmative defense. A respondent must exercise due diligence in gathering the evidence for presentation of its case. See *A. N. Electric Corp*., 276 NLRB 887 fn. 11, 897 (1985). Further, we are not presented here with new evidence indicating that a key witness may have committed perjury in testifying regarding a material fact. Rather, the proffered evidence bears only on the credibility of witnesses and as such does not warrant reopening the record. Compare *Inland Container Corp.*, 273 NLRB 1856, 1857 (1985).

circuit courts agree. The Fourth Circuit Court of Appeals has held that the Board's primary and exclusive jurisdiction to determine unfair labor practices renders Board decisions dispositive where they conflict with determinations in other forums. *Peninsula Shipbuilders' Assn. v. NLRB*, 663 F.2d 488, 492 (4th Cir. 1981). Similarly, the Fifth Circuit Court of Appeals has held that the Board's determination of a work assignment dispute took precedence over a district court's ruling in a Section 301 arbitration proceeding that conflicted with the Board's determination. *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 767 (5th Cir. 1966). And the Eighth Circuit Court of Appeals reaffirmed the Board's jurisdictional competence to determine matters properly within its statutorily defined sphere, without being constrained to grant res judicata or collateral estoppel effect to Federal District Court judgments rendered in closely related Section 301 proceedings. *NLRB v. Huttig Sash & Door Co*., 377 F.2d 964, 970 (8th Cir. 1967).[2] In this case, the Board was not a party to the New York State Court proceedings. Accordingly, we decline to give them a preclusive effect.

We turn now to the merits of the General Counsel's contention that Respondents assumed the RAB contract. We agree with the judge that they did not. We have consistently exercised restraint in applying an assumption-of-the-contract theory. We require clear and convincing evidence of consent, either actual or constructive, before we will find that an assumption of the contract occurred. See *E G & G Florida, Inc*., 279 NLRB 444, 453 (1986); *All State Factors*, 205 NLRB 1122, 1127 (1973). Here the evidence is ambiguous. Although the seller of the two apartment complexes appears to have understood that the Respondents would assume any labor agreements, and the contract of sale intimated as much, unmistakable written manifestation of the Respondents' intent with respect to the existing RAB contract is lacking. Further, the Respondents did not take the steps necessary under the RAB contract's own terms to adopt it once the sale was consummated. Thereafter, the Union engaged in conduct inconsistent with any understanding that the Respondents had assumed the existing RAB contract. Thus, the Union sought to bind the new owners to the Independent Apartment House Agreement or to negotiate an entirely new agreement. Under these circumstances, like the judge, we find that the Respondents and the Union[3] did not actually or constructively assume the existing RAB contract.

[2] We are aware that our failure to afford collateral estoppel effect to other state and Federal proceedings in certain circumstances is not without its critics. See *NLRB v. Donna-Lee Sportswear Co*., 836 F.2d 31 (1st Cir. 1987). *Donna-Lee* is distinguishable, however. The relationship between the Board and the Union here is not the same as that which existed in the *Donna-Lee* case. There the existence of a contract between Donna-Lee and the Union was the essence of the unfair labor practice charge. The issue of assumption of the contract is only one aspect of the unfair labor practices alleged here. The complaint alleged a violation of the Act based on successorship, an area where the Board's judgments under the Act are given particular deference, as well as an assumption of the labor agreement. See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). The General Counsel has not shown that the state court addressed or decided the successorship question. Further, in the instant case, the question of whether there is a contract has implications concerning the nature of a strike, i.e., whether that strike is an economic strike or an unfair labor practice strike, and this issue, in turn, has implications concerning Sec. 8(a)(3) of the Act. Where, as here, the contract issue has implications concerning the nature of a strike and the provisions of Sec. 8(a)(3) of the Act, we believe that the Board should not be bound by a state court resolution of that contract issue.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Field Bridge Associates and Rachel Bridge Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[3] We do not rely on the judge's analysis of the consequences if the Respondents had assumed the existing RAB contract covering an inappropriate mixed unit of guards and nonguards. See *Corporacion de Servicios Legales*, 289 NLRB 612, 613 (1988).

We note both the Ebbet's Field and Washbridge units consisted of guards and nonguards. Such units are not appropriate under the Act. Because a successor employer is only obligated to bargain in an appropriate unit, the Respondents had no obligation to continue to recognize or bargain with the Union in inappropriate units. See *Wackenhut Corp*., 287 NLRB 374, 376 (1987); *Rapid Armored Truck Corp*., 281 NLRB 371 fn. 1 (1986).

Elias Feuer, Esq., for the General Counsel.
Martin Gringer, Esq. (Kaufnan, Frank, Naness, Schneider & Rosensweig), for the Respondents.
Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm), for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on December 11 through 14, 1989. The charge in Case 29–CA–13582 was filed on June 14, 1988, against Respondent Field Bridge. The charge in Case 29–CA–13720 (formerly Case 2–CA–23014), was filed against Rachel Bridge on August 29, 1988. The charge in Case 29–CA–13788 was filed against Field Bridge on November 14, 1988. And the charge in Case 2–CA–14230 was filed against Rachel Bridge on July 24, 1989.[1]

On February 27, 1989, the Regional Director for Region 29 issued a consolidated complaint against the Respondents in Cases 29–CA–13582, 29–CA–13788, and 29–CA–13720 which was amended on July 27, 1989. On August 29, 1989, the Regional Director issued a complaint in Case 29–CA–14230 which was consolidated with the other cases on No-

[1] All dates are in 1987 unless otherwise indicated.

vember 29, 1989. In substance, the consolidated complaint in the first three cases alleged as follows:

1. That Respondent Field Bridge Associates, on July 1, 1987, executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective-bargaining agreement of the seller when Field Bridge purchased a group of apartment buildings called the Ebbet's Field Housing Complex.

2. That Respondent Field Bridge, on July 1, 1987, commenced operating the Ebbet's Field complex retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

3. That Rachel Bridge Corp., on July 1, 1987, executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective-bargaining agreement of the seller when Rachel Bridge purchased Washbridge Apartments.

4. That Rachel Bridge Corp., on July 1, 1987, commenced operating the Washbridge Apartments retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

5. That both Respondents were successors and that the Respondents violated Section 8(a)(1) and (5) of the Act when they refused to remit dues and initiation fees and when, after the collective-bargaining agreements expired, they unilaterally failed and refused to continue to make payments to the contractually provided health and pension funds.[2]

6. That since on or about September 22, 1988, and until certain dates set forth in the order amending complaint dated July 27, 1989, the Respondent Field Bridge has refused to reinstate certain of its employees who engaged in a strike and who made unconditional offers to return to work on September 9, 1988.[3]

The complaint in Case 29–CA–14230 alleged that the Respondent Rachel Bridge on April 21, 1989, had violated Section 8(a)(1) and (5) of the Act by unilaterally granting employees a wage increase.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

The Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Sale of the Ebbet's Field and Washbridge Apartment Complexes*

There is an apartment building complex known as Ebbet's Field Housing located at 1720 Bedford Avenue, Brooklyn, New York. Previous to 1987 that complex was owned by New Field Housing Co., Inc. which in turn was owned by a company called Cedar York Properties Limited Partnership. In 1984 a company called Arco Management Corp. was hired to be the managing agent of the property and Arco signed an ''assent agreement'' whereby it (Arco) agreed to be bound to the terms of the master agreement between a multiemployer association called the Realty Advisory Board on Labor Relations (RAB) and the Union. As such, the Union became the collective-bargaining representative of certain of the employees at the Ebbet's Field Housing complex.

There also is another apartment complex known as the Washbridge Apartments located at 1365 St. Nicholas Avenue, New York, New York, which was owned ultimately by Cedar York. At this site, Arco was also engaged as the managing agent and Arco signed the ''assent agreement'' on May 2, 1985, whereby it (Arco) agreed to be bound by the terms of the RAB's collective-bargaining agreement with the Union.

One of the many peculiarities in this case is that Arco essentially was hired by the New York State Division of Housing in 1984 because of some dispute between the State and the owners. As a result, the equitable owner, Cedar York, neither had control over management nor access to records and documents. Further, because of this situation, although Arco was signatory to collective-bargaining agreements with the Union, the owners of the properties were not privy to those agreements and had not authorized Arco to enter into them on their behalf. Indeed, it appears that neither Cedar York nor the other companies holding title to the properties ever had possession of the relevant collective-bargaining agreements.

Both sets of apartment complexes employed service and maintenance employees as well as guards. Pursuant to the assent agreements, the collective-bargaining units in both complexes included both guards and nonguards. Moreover, the number of guards in each unit made up almost one-half of the bargaining unit employees. In both cases, the employees were employed by Arco and not by Cedar York.

The 1985 to April 21, 1988 Apartment Building Agreement between Union and the RAB states at article IX:

> 1. If there is a bona fide sale or other transfer of title of any member building, or a change of control through a lease, or in the case of a non-corporate ownership, if any person or persons completely divest themselves of ownership or control by any arrangement, the successors in ownership or control, may, unless they have otherwise indicated their intention not to be bound by this

[2] As to dues and initiation fees, the complaint alleged that the Respondents refused to make such payments from July 20, 1987. In the case of pension and health payments, the complaint alleged that the refusals commenced on August 1, 1987. As to all payments, the complaint alleged that the Respondents continued to refuse to make such payments from December 14, 1987, a date 6 months prior to the filing of the unfair labor practice charges. The Union, however, takes a different position than the General Counsel. It seeks a remedy only from the date of the contract expiration dates on April 21, 1988.

[3] It also is contended that the strike, which commenced on January 12, 1988, was caused and prolonged by the Respondent Field Bridge's unfair labor practices.

[4] Both the Charging Party and the General Counsel, prior to the opening of the hearing, made motions to strike certain portions of the Respondents' answer. In support of these motions, it was argued that the Board was bound to accept as final, the opinions of two state court judges in relation to two arbitration cases filed by the Union against the employers. I rejected those motions and reaffirm my earlier conclusions in that regard. My reasons for so doing are set forth in my Order dated July 17, 1989, which is attached hereto as App. A.

> agreement, join the RAB and adopt the contract within 30 days after such acquisition, provided:
>
> (a) The building is not already bound by another agreement.
>
> (b) Written notice is given to the Union within 5 days after joining the RAB . . . .
>
> . . . .
>
> 4. [I]n the event of a change of Employer in a building, the RAB shall use its best efforts to have the succeeding Employer join the RAB and become bound by the terms of this Agreement.
>
> . . . .
>
> Nothing herein contained shall be deemed to limit or diminish in any way the Union's right to enforce this Agreement against any transferee pursuant to applicable law concerning rules of successorship or otherwise . . . .

In 1985 Cedar York sought to sell the two properties and entered into negotiations with the principals of Field Bridge and Rachel Bridge. As Cedar York was not privy to the contracts made by Arco, it sent a letter to the Department of Housing (DHCR) on December 1, 1986, requesting among other things, copies of all leases, service contracts, and union contracts. The labor agreements and the service agreements were not provided to Cedar York. Therefore the negotiations for the sale of the properties proceeded with some important information unknown to both sides.

On December 4, 1986, a sales contract was executed between Cedar York, Field Bridge, and New Bridge for the two properties. The price was $45 million. Later this was reduced to $44 million because the seller could not provide the current financial statements, or any of the agreements that affected the property such as service agreements, labor contracts, or laundry service contracts.

In my opinion, it is important to note that Arco, which never had any contract with Cedar York but who was the employer of the affected employees, was not was not a party involved in the sale of the properties.

The contract of sale dated December 4, 1986, states at 3 and 4, inter alia:

> 3. *State of Title* The Premises are sold and shall be conveyed subject to the following matters:
>
> . . . .
>
> (n) All contracts or service agreements relating to the operation or maintenance of the Premises and any renewals or replacements thereof, which shall be assigned to and assumed by the Purchaser on the Closing Date by instrument in the form annexed as Schedule I.

Paragraph 39 to the contract's rider which was drafted by the buyer's representative, Elliot Gross, states:

> Purchaser acknowledges that Seller makes no representations as to contracts or service agreements relating to the operation or maintenance of the Premises or employees, salaries and benefits, etc. relating to personnel involved in the operation or maintenance of the Premises and that Purchaser will purchase the Premises subject to all of the foregoing as same exist as of the Closing Date.

In an affidavit, Gross stated:

> (1) I am a general partner in Fieldbridge Associates with Shalom Drizin, Reuben Schron, Murray Leifer and Jack Gora. I acted as attorney for Fieldbridge in the acquisition of Ebbet's Field Housing Project . . . .
>
> . . . .
>
> (4) Before signing the contract of sale . . . we negotiated various changes from the initial draft prepared by the seller. It is my standard practice to seek inclusion in the sales contract a provision that states ''There is no agreement in effect between the seller and any union with respect to the building employee or employees and there will be none at closing.'' (If that is the fact.)
>
> (5) Mr. Mantel indicated that he could not agree to most of my requests for representations because of lack of knowledge on the operation of the property since the Cedar York people had been ousted by DHCR and were persona non grata. Because of the inability of the seller to make most of the requested representations, paragraph 39 was added to the Rider.
>
> (6) There was no specific discussion between Mr. Mantel and me about the meaning of the language ''contracts or service agreements'' This phrase has a common meaning among real estate practitioners. It would include those agreements which deal with the management and operation of the properties which are the subjects of the transaction such as (1) elevator service, (2) extermination, (3) boiler maintenance, (4) water conditioning, (5) laundry services and (6) union contracts if any.
>
> (7) Local 32B was never mentioned during the negotiations of the contract for sale. I was not familiar with the fact that the ''customs in respect to title closing adopted by the Real Estate Board of New York Inc.'' makes direct reference to 32B.
>
> (8) Technically a service contract does not include laundry or union contracts, but it is not uncommon to see laundry or union contracts included in such a schedule.

Between December 4, 1986, and the closing which took place over a period of days in late June 1986, there were two modifications in the sales agreement. They dealt with a rent strike and and with potential asbestos problems which might require repairs. No discussion was had between the seller and the buyer as to union agreements or with respect to the wages and benefits for employees.

On June 8, 1987, Arco sent a letter to Schron a principal of the buyers. This letter, which did not refer to an labor agreements with Local 32B-32J, stated:

> [I]t is my understanding that you plan to close on Washbridge and Ebbet's Field on June 30th, I am concerned over our management position . . . .
>
> If it is not your intention to retain Arco . . . to manage the complexes, I would appreciate you notifying me of this. It is unfair to our employees to put them in this position, or to wait until the eleventh hour to let them know where they stand. We could start making arrange-

> ments with some of them concerning the continuation of their employment with you or with my firm.

On June 22, 1987, Arco, apparently concerned about the possibility of incurring severance pay liability at the two apartment complexes, sent another letter to Schron which stated:

> This is to advice you of the terms of the referenced Employer/Union Agreement as it pertains to employee severance/continuation based on a bona fide sale or transfer of title:
>
> If the buyer does not offer employment at existing wages to employees, the seller is responsible for 6 months severance pay to all terminated employees in addition to any other accrued payments. The buyer and seller may agree to split severance pay.
>
> The buyer may choose to join RAB and adopt the Agreement in which event, the severance pay will not be required.
>
> If the buyer retains a significant percentage of former employees, the NLRB may appoint the current union as the bargaining agents for the employees even if they have been severed by the seller.
>
> The above information was obtained from the Union Agreement and the opinion of RAB's attorney.

The closing for the two properties required several days from June 25 to July 2, 1987. According to a Mr. Junghuns, the attorney representing the seller, the intention was that all outstanding agreements relating to the properties, including labor agreements were to be assumed by the buyers. There is, however, nothing in writing to explicitly indicate this intention. However, given the statements in the Gross affidavit, it may very well be that the buyers (you should pardon the expression) were buying a pig in a poke.

As in the case of the initial sales contract, Arco was not privy to, nor did it participate in, the transfer of the properties. Also, at no time prior to the closing did the Union either participate in the transactions or attempt to contact the buyers.

On or about July 1, 1987, title to the two properties transferred from Cedar York to the purchasers. The parties agree that the following facts are not in dispute.

1. As of July 1, all the employees at both projects, including both service and maintenance employees as well as guards, were retained by the new owners and they continued to do the same work and receive the same hourly wage rates, sick leave, vacation, and holiday benefits. It is agreed that the security guards at both apartment complexes were guards as defined in Section 9(b)(3) of the Act.

2. Since July 1, 1987, neither Respondent has remitted union dues to the Union. (The evidence indicates that at Washbridge, Rachel Bridge has continued to deduct dues but has not remitted them to the Union.)

3. Field Bridge, since July 1, 1987, has failed and refused to make contributions to the health fund and pension fund for employees at Ebbet's Field.

4. Rachel Bridge since August 1, 1987, has failed and refused to make contributions to the health fund and pension fund for the employees at the Washbridge Apartments.

5. At the time of the takeover, there were about 69 employees in the Field Bridge unit (Ebbet's Field) of which 24 to 27 were security guards.

6. At the time of takeover, there were about 61 employees in the Rachel Bridge unit (Washbridge) of which about half were security guards.

7. Between July 1 and August 1, 1987, at Washbridge, Arco continued to manage the buildings.

B. *Events Subsequent to the Sale*

At the Washbridge Apartments, Arco was kept on as the managing agent for a short period of time. According to Vosel Autzon, the site manager at Washbridge, there was a meeting between ARCO and Rachel Bridge on July 7, 1987 at which Jeffrey Goldstein, president of ARCO said that he had contacts with the Union and thought he could obtain certain cost-saving measures for the new owners. As as result of this meeting, Rachel Bridge asked ARCO to send a letter to the Union and such a letter was sent on August 31, 1987. This read:

> The new Owner of the building has asked me to meet with you to discuss the following items that we would like you to bring to the attention of the proper persons at Local 32 B-J.
>
> (1) Since Arco . . . has been the managing agent, two Porters have been added to the ranks of our union contract. We are presently asking for those two Porters to be removed from employment to reverse us back to the normal size of our union contact. These two porters were added since the 1983 contract was negotiated.
>
> (2) The new Owners of Washbridge Apartments, known as Rachel Bridge Associates, would like to replace the Security Guards that are presently on their payroll, with a security guard service company. The security guard service can be Local 32 B-J members and it is our intent to hire a security company with such employees. At the present time we wish to change the security in the building and go with a private contractor.
>
> (3) The new Owners . . . are requesting a reduction in staff of 9 persons. It is agreed by this management company that the maintenance and cleaning staff at Washbridge Apartments is overstaffed by nine persons and a reduction of these persons would not decrease the services to the tenants. We would reduce the staff by attrition.

At the Washbridge Apartments, the evidence shows that for the month of July 1987 moneys for pension and welfare were deducted from employees earnings and remitted to the Union. However, there later arose a dispute between Rachel Bridge and Arco as to the latter's authority to make such payments, with Rachel Bridge maintaining that those payments were unauthorized and invalid. There also is evidence that at least for the security personnel at Washbridge, the Respondent conferred with the Union regarding a number of disciplinary and other personnel matters during the months of August, September, and October 1987. Thus, there is some indication as evidenced by memoranda, that Rachel Bridge was operating Washbridge under the assumption that the previous union contract placed some limitations on its discretion.

The situation at the Ebbet's Field Apartments in the period immediately after the sale was somewhat different, one reason being that Arco was not retained there. Thus, unlike at Washbridge, the Respondent at Ebbet's Field as of July 1, 1987, not only ceased remitting union dues but also stopped remitting money to the Union's pension and welfare plans.

Union Representative Lorry McGowan testified that in July 1987 he met with Field Bridge Representatives Klein and Safrin at Ebbet's Field. He states that when he got there Safrin said: ''The union finds out quick; already you're here.'' McGowan states that he mentioned that we would like to have them sign a contract eventually but that this could be discussed at a later date.

According to McGowan he again spoke with Safrin in mid-August 1987 and told Safrin that he would like to bring down a contract for signature. McGowan states that when he delivered the contract a day or two later, he told Safrin that there was no pressure to sign it right then; that he should have his attorney look it over and get back to him in a couple of weeks. According to McGowan, Safrin said that he would go over it with the attorney and that the company's principals could sign it.

It is noted that the contract tendered by McGowan to Safrin for Ebbet's Field, was not the RAB agreement that Arco had previously assented to. Rather, it was the Independent Apartment House Agreement.

Later in August 1987, McGowan called Safrin to let him know that there was an arbitration hearing scheduled relating to the discharge of an employee by Arco prior to the transfer on July 1. According to McGowan, he also asked what was happening with the contract and that Safrin told him not to worry, that it would be signed.

On September 18, 1987, the Union in relation to the arbitration case, sought to add Field Bridge as a party to that proceeding.

On October 29, 1987, the Union sent a letter to Rachel Bridge (Washbridge Apartments), enclosing a copy of the Independent Apartment House Agreement. (Not the RAB agreement.) The letter read:

> The enclosed agreement is the standard industry-wide collective bargaining agreement. This agreement has already been negotiated and, accordingly, is not a proposal. You are being offered the opportunity to enter the enclosed agreement with the Union. In the event that you wish to avail yourself of this opportunity, please sign both of the enclosed agreements and return them to the Union. Upon receipt of same, we shall return a fully executed copy to you.
>
> In the event you do not wish to avail yourself of this agreement, please advise and we will arrange for the commencement of negotiations and will submit written proposals for a new collective bargaining agreement.

On December 1, 1987, the Union wrote to the Office of the Contract Arbitrator seeking to amend a pending arbitration case against the prior owners and Arco to add Rachel Bridge as a party. Thereafter, on February 4, 1988, the Union sought arbitration against Rachel Bridge under the RAB contract for laying off the guards. In relation to these actions, the company sought to enjoin the arbitrations in state court. However, in the case of Rachel Bridge, Administrative Law Judge Moskowitz seemingly accepted the Union's contention that Rachel Bridge had assumed the predecessor's contract and she refused to stay the arbitrations.

On August 11, 1988, Rachel Bridge's new attorney, Martin Gringer, sent a letter to Sturm regarding the Washbridge Apartments. This read:

> As you also are aware, my client has taken the position that it did not assume any collective bargaining agreement in effect when it purchased Washbridge Apartments in July, 1987. This issue is presently being litigated in the state courts. Inasmuch as the parties have been unable to agree upon the terms of a collective bargaining agreement, my client would have the right under the . . . agreement to provide ten days written notice to cancel any prior agreement, if it had assumed such a contract. This letter constitutes ten days' notice of such cancellation of any collective bargaining agreement that may exist between the parties. This notice of cancellation is without prejudice to my client's position that it has not assumed the . . . agreement.
>
> It is also my understanding that on or about August 31, 1987 my client gave notice to the Union that it did not recognize it as the collective bargaining agent for guards and security personnel employed at Washbridge Apartments. In the event, however, that a court or government agency ultimately finds that there was a contact in existence at any time, this letter shall constitute notice that my client wishes to withdraw any recognition of the Union as the representative of guards or security personnel upon the expiration of any contract that may be ultimately held to have existed.

C. *The Negotiations and Strike at Washbridge Apartments*

As noted above, the Union on October 29, 1987, tendered to Rachel Bridge a copy of the Independent Apartment House Agreement.

According to Rachel Bridge's site manager, Vosel Autzon, a meeting was held on November 24, 1987, at the offices of the Company's attorney Joseph Reichbart. Autzon testified that Reichbart said that the Company was willing to negotiate but needed relief including: (1) reduction of the maintenance staff; (2) elimination from any contract of the security staff; and (3) absolution from any prior arbitrations involving the prior owners. He states that the Union took the position that it didn't bargain away men and that it wanted the Company to sign the Independent as opposed to the RAB contract. According to Autzon, the Union stated that the Company could not get the RAB contract because the 30-day period had run. He testified that no one from the Union took the position that the Company had assumed the predecessor's RAB contract.

On December 18, 1987, the Union sent a letter to the Office of the Contract Arbitrator reading in pertinent part:

> Our firm represents Local 32B-32J . . . New Bridge Housing Co., Inc. by its agent Arco . . . has assented to be covered by the 1985 Apartment Building Agreement between the Union and the Realty Advisory Board . . . .

> A dispute has arisen concerning the Employer's failure to honor Article IX of the Agreement, when it, in or around June, 1987 sold the premises to an entity, Rachel Bridge Associates. This entity did not employ the building service employees at the then existing wages, hours, and working conditions. In addition, the successor has failed to cover any employees with medical insurance, pension coverage, or pre-paid legal services.
>
> As a result of the above, the Union will seek as a remedy damages of severance pay for each unit employee of six months pay, contributions, plus liquidated damages and interest to the respective Funds, and such other relief as the arbitrator seems just and proper.

Like the similar letter sent on December 17 regarding Ebbet's Field, the Union named the parties as being New Bridge (the old owner), Arco, and the RAB.

On January 7, 1988, Rachel Bridge subcontracted out the security guard work at the Washbridge Apartments.

On January 13, 1988, the service and maintenance employees at Washbridge commenced a strike. After the strike commenced a meeting was held between the Union and the Employer. According to Autzon, Attorney Reichbart asked if the Union would let the men work while negotiations were going on. He states that the Union's attorney, Sturm, said that they would not call off strike until they got a signed agreement, that he was not willing to accept the Company's prior proposals and the he would bring in the Union's proposal on the following morning. According to Autzon, when Reichbart asked for contract similar to the RAB contract but with concessions, Sturm said the Company could have the RAB contract and thereafter ask for reductions.

According to Autzon, on January 14, the Union presented its contract proposal which called for a large wage increase. He states that when the Company said that the proposal was preposterous, Sturm said the increase was from savings derived from letting the security people go.

On the afternoon of January 14, 1988, the strikers at Washbridge returned to work. Union Agent Pizzaro told Autzon that the Union was willing to negotiate with a deadline of January 25, while the men worked.

On January 15, 1988, Reichbart sent a letter to the Union reading:

> We wish to state that management is willing to commence immediate negotiations and attempt to conclude a collective bargaining agreement on or before January 25, 1988 provided the Union meets promptly and continuingly with management . . . .
>
> We reiterate that management is willing to abide by all of the conditions of the Union's contract with the . . . RAB, which is expiring in April, 1988 and is willing to abide by whatever contract is negotiated by the Union and the RAB for any period after April 21, 1988 on a one year basis or a three year basis.
>
> Management also takes the position: (1) that the maintenance employees constitute a unit of 27 full-time employees; and (2) management will not be responsible for any pending or other arbitrations arising from any incidents prior to July 1, 1987, the date of the passage of title from the previous Seller . . . .
>
> Management will pay all dues and benefits under the Union's contract with the RAB as we understand them, retroactive to that date.
>
> Management also takes the position that a request or a bargaining demand which has been made . . . for a general wage increase . . . of $1.50 . . . from which the Union refused to budge . . . is not evidence of bargaining in good faith . . . .
>
> If there is no substantial movement from that position . . . to attempt to make an ''example'' of this employer as has been stated by the Union representatives, management will withdraw any offers . . . and seek a 10% reduction in all wages and other conditions of employment.

D. *Negotiations with Field Bridge Regarding Ebbet's Field*

In November 1987, Chuck Ellman, a labor consultant retained by Field Bridge, contacted Union Representative Kevin McCulloch and said that he wanted to negotiate for a contract covering the employees at the Ebbet's Field project. He states that McCulloch referred him to Serge Jean-Jaques the Union's district manager whereupon a meeting was arranged at the Union's office for December 1, 1987.

According to Ellman, at the meeting on December 1, 1987, he said that the Company wanted to negotiate a contract excluding guards. According Ellman, the Union's attorney Ira Sturm said that although he was unhappy with the Company's position, he understood that under the law the Union was not entitled to recognition in a mixed unit. Ellman states that Sturm said that there were three types of contracts to chose from: (1) the RAB contract; (2) the independent industry agreement; and (3) a new contract negotiated from scratch. According to Ellman, Sturm asked the union representatives if Field Bridge had ever signed an assumption or assent agreement and the union agents acknowledged that the only assent agreement they had in their records was one signed by Arco in 1985 for Ebbet's Field. According to Ellman, when the Union pointed out that the Employer was deducting union dues, he responded that when the payroll records maintained by Arco's computer company were transferred, the deductions were automatically made and it was the Employer's intention to return the dues to the employees. Ellman states that when Sturm asked if the new employer had made any plans with respect to security guards, he replied that the company was looking to subcontract this work to an outside guard company. He states that Sturm suggested that the company consider either hiring a guard service already under contract with the Union or a guard service that would agree to hire the existing guards. According to Ellman, he agreed to provide a copy of the purchasing agreement when it was requested by Sturm.

On December 17, 1987, Field Bridge subcontracted out the security guard work. At this time there were 23 security guards employed at Ebbet's Field.

Also on December 17, 1987, the Union's attorney sent a letter to the RAB office of the contract arbitrator reading:

> Our firm represents Local 32B-32J . . . New Field Housing Co., Inc. by its agent Arco Management Corp., has assented to be covered by the 1985 Apartment Building Agreement between the Union and the Realty

> Advisory Board . . . for its employees at 1720 Bedford Avenue.
>
> Said Agreement provides for the submission of disputes to the Office of the Contract Arbitrator.
>
> A dispute has arisen concerning the Employer's failure to honor Article IX of the Agreement, when it, in or around June 1987, sold the premises to an entity, Field Bridge Associates. This entity did not employ the building service employees at the then existing wages, hours, and working conditions. In addition, the successor has laid off approximately 25 unit employees and failed to cover any employees with medical insurance, pension coverage, or pre-paid legal services.
>
> As a result of the above, the Union will seek as a remedy damages of wages for the 25 laid-off employees for the duration of the collective bargaining agreement, severance pay for each unit employee of six months pay, contributions, plus liquidated damages and interest to the respective Funds, and such other and further relief . . . .

In the above-quoted letter, the Union asserted that the parties were the old owner, New Field Housing Co., Inc., the old manager Arco and the Realty Advisory Board. Field Bridge the new owner, was not named by the Union as one of the parties.

Ellman testified that at a meeting on December 22, 1987, Sturm said that the Company no longer had the option of having the RAB agreement because that contract required a purchaser to agree to assume the RAB contract within 30 days of a closing. According to Ellman, Sturm said that the Union wanted the independent agreement, excluding guards, retroactive to the date of purchase. Ellman states that Sturm said that because the Company was saving money by subcontracting out the guard work, this money should be given to the remaining employees. Ellman states that Sturm also said that he had obtained a copy of the purchase agreement from the seller and that he thought he could make out an argument that the buyer had assumed the RAB contract.

On January 11, 1988, an internal memorandum was sent from McCulloch to Donald Mumm regarding both apartment complexes This read:

> President Bevona met with me on January 8, 1988 and instructed me to issue strike authorization for the above two buildings. We are to strike only with the maintenance employees and use regular on-strike signs.
>
> The security guards should not assist in the picketing and should not become involved in the strike in any way . . . .

At Ebbet's Field the strike began on January 12, 1988. The service and maintenance employees who participated in the strike were told by Union Agent LaRosa that they were going on strike because the Company was not making payments to the health fund, was not remitting dues, and was not honoring the contract. According to LaRosa, he also told the employees that the strike was to get the company to the bargaining table to negotiate. The picket signs read, ''On Strike.''

In response to the strike, Field Bridge entered into a verbal arrangement with M&M Maintenance Corporation to provide service and maintenance work at the Ebbet's Field site. This subcontracting agreement was terminable at will at the option of either party. (This did not apply to Rachel Bridge.)

The Union tendered a contract proposal to Field Bridge on January 14. By its terms, it is clear that at this time the Union was seeking to negotiate a new contract and was not seeking to bind the Respondent to the Arco's agreement. In this regard, Ellman states that Sturm said that the Union no longer wanted the existing independent contract, but wanted to set new industry standards. (The RAB contract was to expire in April 1988, 4 months away.) Ellman states that he said that the Company would agree to any proposals that the Union wanted so long as the Union agreed that the Company would get the same as what ultimately was agreed to between the Union and RAB. According to Ellman, when the Union refused, the Company made a proposal for a reduced wage increase and for retroactivity. No agreement was reached.

On January 14 or 15, 1988, the Union sent a newsletter to the residents of Ebbet's Field indicating the Union's position regarding the strike:

> On or about July l, 1987 New Field Housing purchased . . . the complex known as Ebbet's Field Housing. Since the closing, the new owner stated that they wanted it strictly understood that they would never assume the contract with Local 32B-32J covering the long-term maintenance and security employees. They made it perfectly clear that it was their intention to drastically reduce the wages and benefits of the security personnel who had been employed at this housing development for approximately 30 years . . . .
>
> They then proceeded to demonstrate the absurdity of this statement by engaging SSI Security who brought in new guards and reduced the former wage scale in excess of one-half.
>
> After negotiating for several months, and after seeing what had happened to the security guards, the Union in anticipation of the same callous disregard for the maintenance employees, had no alternative but to strike the housing development . . . .

On January 28, Field Bridge sent letters to its employees reading:

> We have become aware that our payroll dept. has made improper deductions from hour wages. Enclosed you will find repayment of those improper deductions, along with accumulated interest.

On February 16, 1988, Field Bridge obtained an Order to Show Cause in a New York court seeking to stay the previously described arbitration hearing. As noted above, the Union had sought to add Field Bridge as a party to a grievance that had arisen before it took over the property. On April 26, Judge Gammerman, apparently agreed with the Union's contention that Field Bridge had assumed the RAB contract, and issued an oral order refusing to stay the arbitration. In this regard, it seems to me that the the first time that the Union seriously contended that either Field Bridge or Rachel Bridge had assumed the RAB contract was during the the court proceeding.

On March 3, 1988, Ellman sent a letter to the Union notifying it that the Employer contemplated permanently subcontracting out all janitorial/porter work at Ebbet's Field.

On April 21, 1988, the contract between the Union and the RAB expired.

On May 6, 1988, Ellman sent a mailgram to Sturm regarding the Ebbet's Field Apartments as follows:

> Pursuant to Article XVIII of the expired RAB contract with . . . Local 32B-J, for the employer we herein demand to immediately meet to negotiate a successor agreement. This notice is given based upon the recent decision in New York State Supreme Court. It should not be construed as a waiver by the employer of any statutory or procedural recourse available to it.

On May 9, 1988, the Union sent a letter to the contract arbitrator setting forth alleged contract breaches by Field Bridge including:

> On or about December 17, 1987, the employer in violation of Article IV of the Agreement discharged its security employees without giving them a written statement getting forth the reasons for the discharge.

At an arbitration hearing held on February 15, 1989, the Union took the position that it sought backpay for the guards at the contract rate through the expiration date of the contract and reinstatement by Field Bridge to their former jobs.

On June 10, 1988, Martin Gringer sent the following letter to Ira Sturm:

> This office now represents Field Bridge . . . in its . . . negotiations with Local 32B-32J. As you also are aware, my client has taken the position that it did not assume any collective bargaining agreement in effect when it purchased Ebbet's Field Apartments in July, 1987 . . . . Inasmuch as the parties have been unable to agree upon the terms of a collective bargaining agreement, my client would have the right under the . . . agreement to provide ten days written notice to cancel any prior agreement, if it had assumed such a contract. This letter constitutes ten days' notice of such cancellation . . . . This notice of cancellation is without prejudice to my client's position that it has not assumed the . . . agreement.
>
> It is also my understanding that on or about December 1, 1987 my client gave notice to the Union that it did not recognize it as the collective bargaining agent for guards and security personnel employed at Ebbet's Field Apartment. In the event, however, that a court or government agency ultimately finds that there was a contract in existence at any time, this letter shall constitute notice that my client wishes to withdraw any recognition of the Union as the representative of guards or security personnel upon the expiration of any contract that may be ultimately held to have existed.

On June 1, 1988, Sturm replied:

> The Union's position is that the Employer cannot have it both ways. Either there was an assumption of the Agreement, in which event the parties are obligated to bargain to impasse prior to any unilateral changes, or there was no assumption, in which case the parties are merely obligated to bargain based upon the recognition by your client of the Union.
>
> I am not aware of any provision allowing your client ten days to cancel an agreement it does not recognize. Your client must first recognize the existence of the agreement before it can exercise options thereunder.

E. *The Issue Relating to Reinstatement of the Strikers at Ebbet's Field*

In the beginning of September 1988, all the strikers at Ebbet's Field asked to go back to work.

On September 22, 1988, Field Bridge sent the following letter:

> I am in receipt of your request for reinstatement. Unfortunately, we are not in a position to offer any striking employees reinstatement until such time a union agreement has been reached . . . .

The above letter was sent to employees Bolivar Arias, Ryland Barrett, Anthony Brown, Manuel Carvatal, Anthony De Chiara, Edward Doyle, Elbert Escano, Juan Escano, Robert Burst, Richard King, Andre LaRochel, Arthur LeGros, Raphael Louis, Russell Minnifield, Johnson Pettway, Arnold Pinder, George Rapley, Omar Redman, Maceo Stephens, Fest Thorne, Roosevelt Townsend, and Jose Zuna.

Also on September 22, 1988, Field Bridge sent a different letter to employees James Ellis, Owen Hackett, Oakley Harvey, McKinley King, and Fraiser Townsend. This read:

> I am in receipt of your request for reinstatement. Unfortunately, when the strike began, a permanent replacement was hired to take your place. However, your name has been put on a preferential hiring list. If and when a vacancy occurs, you will be given first consideration for employment provided a union agreement has been reached by that time . . . .

On April 10 and May 5, 1989, Field Bridge offered reinstatement by letters reading:

> Please be advised that you are immediately reinstated to your previous position of employment with Field Bridge Associates. Please contact the undersigned so that we may schedule your return to work.
>
> If we do not hear from you within two weeks of the date of this letter, we will assume you are not interested in returning to work.

Copies of the April 10 letter were sent to Edward Doyle, Arthur LeGros, Raphael Louis, Russell Minnifield, and Arnold Pinder.

Copies of the the May 5 letters were sent to Ryland Barrett, Juan Escano, Robert Hurst, Andre LaRochel, and Frasier Townsend.

The evidence shows that those employees who returned to work in response to the April 10 offer were told that they were to be employed by the maintenance subcontractor, M

& M.[5] As a result, at least one (Arnold Pinder) refused to accept such employment and he ultimately was offered reemployment on the payroll of Field Bridge.

On May 5, 1989, Attorney Gringer wrote to Sturm regarding the offers of reinstatement as follows:

> [T]his is to confirm that the strikers who have been offered reinstatement and who will be offered reinstatement are being offered employment at the same terms and conditions of employment that were in effect at the time the strike commenced. No employee is required to sign any document as a condition of reinstatement. Moreover, any employee who objects to being on the M&M payroll may be put on the Field Bridge payroll.

On May 11, Sturm replied:

> I appreciate the fact that you have intervened in connection with the impropriety of the original offers. I would further appreciate it, if your client could advise those who were offered reinstatement, that the prior preconditions of employment have been removed and that they will be employees of Field Bridge and not M&M.

Thereafter on May 23, Field Bridge sent letters to employees Doyle, Minnifield, and Pinder reading:

> This is to clarify any possible misunderstanding concerning our previous offer of reinstatement. If you desire, you may return to work on the Field Bridge payroll. Moreover, you are not required to sign any document as a precondition of returning.
>
> You are being offered reinstatement pursuant to the same terms and conditions of employment in existence at the time the strike began in January 1988.

On July 24, 1989, Field Bridge sent letters to Arias Bolivar, Anthony Brown, Edward Doyle, Juan Escano, Owen Hackett, Andre LaRochel, Arthur LeGros, Raphael Louis, Jose Luna, Russell Minnifield, Arnold Pinder, George Rapley, and Fest Thorne. These read:

> Please be advised that your prior request for unconditional reinstatement or substantially equivalent employment at Ebbet's Field Apartments is granted. Please contact the undersigned . . . to arrange for your return to work.
>
> If we do not hear from you within two weeks of the date of this letter, we will assume you are not interested in returning to work.

Notwithstanding the offers of reinstatement described above, a number of the strikers never received any offers of reinstatement. These were Manuel Carvatal, Anthony De Chiara, James H. Ellis, Oakley Harvey, McKinley Ring, Richard King, Johnson Pettway, Omar Redman, Maceo Stephens, and Roosevelt Townsend.

[5] According to employee Robert Hurst, who returned to work and was put on the payroll of M & M, he returned to the same job, with the same pay and the same hours. He says that M&M made him work harder than he had worked previously.

F. *Alleged Unilateral Wage Increases*

The evidence in support of this allegation shows at most that in April 1989 Rachel Bridge gave wage increases to its employees in amounts similar or identical to those negotiated between the Union and the Realty Advisory Board. The record does not indicate the state of negotiations between this Respondent and the Union after January 15, 1988, nor does it indicate a failure to give notice to the Union. There is no evidence that the Union sought to bargain with Rachel Bridge after January 15, or that it sought to negotiate with respect these particular wage increases. On the whole, it is my opinion that the evidence is singularly lacking to make out a prima facie case in relation to this allegation.

III. ANALYSIS

A. *The Refusal-to-Bargain Issues*

The complaints allege that both Respondents are successors to the previous owners and have incurred the duty to recognize the Union. The complaints go further and allege that the Respondents adopted or assumed the predecessors' contracts with the Union and therefore are legally bound to honor the terms and conditions of those collective-bargaining agreements. In this respect, the complaints allege that the Respondents violated Section 8(a)(5) of the Act by refusing to remit to the union dues and initiation fees, and by failing to make payments required by the contracts to pension and health care funds. In essence, the General Counsel's case is that when the Respondents on July 1, 1988, took over the properties, they had agreed to the terms of the respective collective-bargaining agreements but then (almost immediately) breached those agreements by failing and refusing to honor their terms.

The Union also bases its contentions on the theory that the Respondents assumed the collective-bargaining agreements. However, the Union, unlike the General Counsel, argues that it ''is seeking in this case a remedy only from the date of the expiration of the collective bargaining agreements to wit, April 21, 1988.'' Thus the Union's position is that the Board should not grant any monetary relief for any period up to April 21, 1988, inasmuch as that relief was sought through arbitration.[6]

Both the General Counsel and the Union take the position that insofar as the ''assumption'' question, the Board should be bound by the findings and conclusions of the state court. They argue that I need not trouble myself with the factual or legal questions surrounding the events leading up to the sale and transfer of the properties, those issues having been decided in another forum. As I have already indicated I rejected this argument for the reasons set forth in Appendix A.

[6] The Union also asserts that the Respondents should be bound to the previous collective-bargaining agreements as a matter of law, because they ''merely purchased the assets'' of the predecessor. This argument is rejected. The evidence shows that the sale of these properties involved an arm's-length transaction and that the new owners had no connection with the prior ownership. At most, the new owners might be considered as successors but this is not a situation where an alter ego was created or where the preexisting company has continued to exist in only slightly modified form. (For example through a stock transfer.) Cf. *McAllister Bros.*, 278 NLRB 601 (1986), enfd. 819 F.2d 439 (4th Cir. 1987); *EPE v. NLRB*, 845 F.2d 483 (4th Cir. 1988).

Unfortunately, it seems that I must come to grips with the facts, evidence, and legal principals relating to this odd and perhaps unique set of circumstances.

Assuming for the moment that the Respondents should be considered ''successors'' under the test of *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), a successor generally has no obligation to honor the predecessor's labor contract and may establish initial terms and conditions unilaterally. Thus in *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980), the court stated:

> A successor employer ordinarily may establish initial terms and conditions of employment without bargaining with the incumbent union . . . the NLRB relied on a narrow exception articulated by the Court in *Burns* . . . . Under that exception as developed by the NLRB, a successor employer is required to bargain with respect to initial terms only if it is perfectly clear that it plans to retain all the employees in the predecessor unit and hires those employees in a manner which leads them to believe that they will be hired on the terms and conditions that existed under the predecessor employer . . . .

In *NLRB v. Burns Security Services*, 406 U.S. 272, 287–288, 291 (1972), the Court stated:

> We also agree . . . that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contact may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms . . . contained in the old . . . contract, may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. . . .
>
> . . . .
>
> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to fact uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the the obligations under the old contract.

As made clear by the Court in *Burns*, supra, a successor may be bound to the predecessor's labor agreement if the successor assumes it. However, it is equally clear that an assumption can only come about as a bilateral agreement, evidenced either by a writing or by the conduct of both parties. That is, the agreement must be a mutual one because a union may not wish to be bound to a contract previously made with an unhealthy predecessor and may want to bargain anew with the new enterprise.

In the present case it is contended that Rachel Bridge and Field Bridge assumed the predecessor's collective-bargaining agreements. They point to the contract of sale executed in December 1986 and to the alleged continued application of the contracts' terms for a period of time after July 1, 1987, when the properties were transferred. I do not agree.

The previous collective-bargaining agreements covering the employees of the two properties was the RAB associationwide contract assented to by Arco Management Corp., which was the involuntary managing agent of the properties for the owner, Cedar York. That is, Arco had been placed in the position of managing the properties by the State of New York over the objections of the owners because of a dispute between the State and Cedar York. Thus, the owner of the properties was neither party to nor privy to the collective-bargaining agreement. When negotiations took place between Cedar York and the Respondents, the terms of the collective bargaining agreement were not known to either the seller or the prospective buyers. Arco and the Union did not play any role in the sale.

Assuming that the Respondents in the December 4, 1986 contract of sale indicated an intention of adopting ''all contracts or service agreements,'' and even assuming that this was understood as including the labor contracts, it is clear that when this contract was made and when the properties were transferred, neither the Union nor Arco were parties to the transaction. Therefore, any agreement that the Respondents made with Cedar York regarding a collective-bargaining agreement is essentially meaningless because Cedar York was not a party to the collective-bargaining agreement.

Further, after the properties transferred on July 1, 1987, the evidence shows that the Union did not, until much later, seek to bind the Respondents to the terms and conditions of the existing RAB contract. Rather, the evidence shows that when the Respondents agreed to bargain with the Union (for the service and maintenance employees only), the Union sought new and different contracts. Additionally, the Union, in effect, acknowledged the nonviability of the RAB contract vis-a-vis the Respondents by statements indicating that the bargaining units would have to be drastically altered. (In fact cut in half, because about 50 percent of the bargaining unit employees of both Respondents at the time of the sale, consisted of guards.) Thus by its actions it is evident to me that the Union did not agree to any ''assumption'' of the preexisting labor agreements. As I have concluded that an agreement to assume a contract must be by mutual consent, I conclude that no such ''assumption'' took place in the instant case.

However, assuming for argument's sake that an assumption did take place, there would still be an overriding defect in the General Counsel's case. If, as contended, the Respondents assumed the RAB contract, that contract would not be enforceable under the provisions of this Act because the bargaining unit on its face, included both guards and nonguards. Moreover, the inclusion of guards consisted of about half of the bargaining unit employees in both cases.

Section 9(b)(3) of the Act provides in pertinent part:

> [T]he Board shall not . . . decide that any unit is appropriate for such purposes [collective bargaining], if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's

> premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

In *Supreme Sugar Co.*, 258 NLRB 243, 245 (1981), the administrative law judge dismissed an 8(a)(5) complaint alleging the failure to honor a contract vis-a-vis watchmen, in view of his conclusions that despite a long history of bargaining, the watchmen were guards as defined in Section 9(b)(3) of the Act.

In *Wells Fargo Corp.*, 270 NLRB 787, 789–790 (1984), the employer withdrew recognition from a union representing guards and nonguards. The withdrawal of recognition involved a bargaining unit of guards and recognition had originally been accorded on a voluntary basis. The Board dismissed the complaint and stated:

> Finally we turn to the judge's conclusion that the Respondent should be ''estopped'' from withdrawing recognition because it had previously extended recognition to the Union. In so concluding, the judge relied on *International Telephone & Telegraph Corp*. [159 NLRB 1757 (1966), enfd. as modified 383 F.2.d 366 (3d Cir. 1967)]. In *ITT*, a Board majority held that an employer was ''estopped'' from withdrawing recognition from a union which it had voluntarily recognized for 13 years in a mixed unit of professional and nonprofessional employees notwithstanding the fact that the professional employees had never voted in self-determination election as required by Section 9(b)(1) of the Act. In finding a violation . . . the Board noted the consensual nature of the parties' relationship but also noted their long bargaining history and the fact that the withdrawal occurred in a context of other unremedied unfair labor practices. Here by contrast, the parties' relationship was less than 1 year old when recognition was withdrawn in a context free of other unfair labor practices.
>
> In reaching its conclusion, the Board in *ITT* further noted that its holding was ''not to be construed as foreclosing the professionals in the unit from seeking [a] self-determination [election] at an appropriate time . . . . In *Utah Power*, however, the Board determined that the professional employees were not precluded from asserting their statutory rights to a self-determination election although they had accepted their situation for *43 years*. In so finding, the Board distinguished *ITT* and noted that the proceeding in *Utah Power* ''was initiated at an appropriate time by professional employees under a provision intended for their protection.'' Contrary to the judge, we conclude that here the Respondent was not estopped form withdrawing recognition from the Union because the estoppel theory, as shown in *Utah Power*, does not operate to preclude the intended beneficiary of the statute from asserting rights thereunder. Inasmuch as the Respondent obviously belongs to the class which is the intended beneficiary of Section 9(b)(3), it was not estopped from asserting its rights under that section by refusing to bargain with the Union when it did.
>
> In sum, while we agree that the Respondent and the Union could enter into a valid voluntary collective-bargaining relationship, we find that the Respondent was privileged to withdraw from the relationship at the time it chose to do so.

It is argued that I should follow *New York Times*, 270 NLRB 1267, 1272 (1984), and find an 8(a)(5) violation although at the same time modifying the bargaining unit to exclude the guards. However, that case is substantially distinguishable from the present case. In *New York Times*, the company was held to have violated Section 8(a)(5) by withdrawing recognition in relation to a group of nonguard employees who had been transferred to other jobs. As part of its defense, the employer claimed that a longstanding bargaining unit was defective because out of approximately 1500 employees, about 30 were guards. There was, however, a real dispute as to the status of the 30 individuals and that dispute was pending before the Board pursuant to a unit clarification petition. To my mind this is very different from the situation in the present case, where the contract to which the Union wants to bind the Employer is, on its face, for a prohibited unit of guards and nonguards. Also, unlike the *New York Times* case, the bargaining units here consisted of an equal number of guards and nonguards.

In short, the theory of the complaint is that the Respondents assumed collective-bargaining agreements which they thereafter breached. In my opinion the Respondents and the Union did not agree to assume the previous contracts. Moreover, I conclude that even if they did, the contracts were fatally flawed as they included guards and nonguards in the bargaining units .

B. *The Strike*

Having concluded that the Respondents had no obligation to honor the terms and conditions of collective-bargaining agreements, it follows that the strikes against Field Bridge and Rachel Bridge were economic and not unfair labor practice strikes.

As the strike at Rachel Bridge terminated almost immediately, the only issue in the present case is whether Field Bridge violated the Act by refusing to reinstate the Ebbet's Field strikers on their unconditional offers to return to work.[7]

---

[7] Field Bridge asserts it had no obligation to reinstate the strikers because the strike was an unprotected rather than an economic or unfair labor practice strike. It argues that the strike was unprotected because it was in breach of a no-strike clause. I can't take this argument seriously as the Respondent also argues that there was no contract between it and the Union. Having concluded that the Respondent did not assume the contract, it follows that there did not exist a no-strike clause to be breached. It also argues that the strikers engaged in unprotected activity because the picketing violated Sec. 8(b)(7) in that the Union was seeking recognition in a unit of guards and nonguards. This is also rejected. First, the Company did not file an 8(b)(7) charge. Second, although the Union may have sought reinstatement for the guards, the Company has not, in my opinion, met its burden of establishing that the Union, via its picketing, sought initial recognition in such a unit. Rather, the evidence suggests that the Union was willing to bargain in a unit consisting only of the service and maintenance employees for whom recognition had been granted. Third, the Company never indicated to the striking employees or to their Union that it viewed their picketing as being violative

Continued

Economic strikers retain their status as employees and are entitled to reinstatement on their unconditional offers to return to work. Failure to offer such strikers immediate reinstatement will constitute a violation of Section 8(a)(3) of the Act unless the employer has substantial and legitimate business justifications for refusing to put them back to their former jobs. Even where permanent replacements have been hired during a strike, the employer must, on a striker's unconditional offer to return to work, offer such reinstatement when vacancies occur unless the strikers in the meantime ''acquired regular and substantially equivalent employment. *Laidlaw Corp*., 171 NLRB 1366 (1968). In circumstances where the employer has refused to reinstate strikers who have made unconditional offers to return to work, it is the employer who has the burden of proof that its failure to offer reinstatement was justified. See also *Bralco Metals*, 227 NLRB 973, 977 (1977).

In the present case the strikers made unconditional offers to return to work in September 1988. In response, Field Bridge sent letters stating that it would not offer reinstatement until a union agreement was reached. The Respondent asserts that it thereby locked out the employees at this point and that such an offensive lockout therefore constituted a substantial and legitimate business justification for refusing to reinstate the strikers. I agree.

In *Boilermakers Local 374 v. NLRB*, 380 U.S. 300 (1965), the Court held that the employer did not violate Section 8(a)(1) or (3) by locking out employees after an impasse had been reached. In *Harter Equipment*, 280 NLRB 597 (1986), the Board held that an employer may use temporary replacements during a lockout for the purpose of bringing economic pressure to bear in support of its legitimate bargaining demands. See also *B-Bar-B, Inc*., 281 NLRB 250 (1986); *National Gypsum Co*., 281 NLRB 593 (1986); *Birkenwald Distribution Co*., 282 NLRB 954 (1987). In *Boilermakers Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988), the court agreed with Board's conclusion that an employer may engage in an offensive lockout while using temporary replacements.

In my opinion Field Bridge was privileged to convert the economic strike into an economic lockout when the strikers asked for reinstatement. As such, it is my opinion that it had no obligation to reinstate these strikers so long as it maintained the lockout in support of its position vis-a-vis a collective-bargaining agreement with the Union.

The evidence indicates, however, that the lockout came to an end on April 10, 1989, when the Employer began to make offers of reinstatement to the strikers. Such offers were made to various of the strikers in April, May, and June 1989, albeit offers were never made to some of the strikers.

The lockout having ended on April 10, 1989, it was then incumbent on the Employer to offer reinstatement to all the strikers who had offered to return to work unless there was as justifiable impediment to so doing. For example, if some of the strikers had been permanently replaced before the lockout and if those permanent replacements were shown to have been employed as of April 10, that might excuse a failure to immediately reinstate an equal number of the strikers. However, the evidence does not show that there were such permanent replacements on Field Bridge's payroll as of April 10. On the contrary, the evidence establishes that on January 12, 1988, Field Bridge subcontracted out the service and maintenance work to M&M Maintenance Corporation and that such subcontracting was intended to be a temporary arrangement during the pendancy of the labor dispute. (It was stipulated that the subcontracting arrangement was an oral agreement and was terminable at the will of either party.) Therefore, in the absence of evidence indicating any legitimate justification, I conclude that the Respondent violated Section 8(a)(3) of the Act by failing to offer reinstatement to those strikers who were not offered reinstatement on April 10, 1989. A fortiori, it is clear that the Company violated Section 8(a)(3) insofar as those strikers who were never offered reinstatement at all.

of Sec. 8(b)(7). Indeed, after the Company ended the lockout, it offered to reinstate most of the strikers, an action which in my opinion constituted a waiver of this contention. This is viewed as analogous to cases under Sec. 8(d) and (g) where an employer cedes the contention that strikers lost their employee status once they are reinstated.

CONCLUSIONS OF LAW

1. By failing to offer reinstatement on April 10, 1989, to all the strikers who had previously offered to return to work, Field Bridge engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. The Respondents have not violated the Act in any other manner encompassed by the complaints.

REMEDY

Having found that Field Bridge has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In view of my conclusion that Field Bridge, on the termination of the lockout, failed to offer reinstatement to all the strikers who had previously offered to return to work, it is recommended that the Respondent be ordered to offer such employees (other than those who did receive such offers on April 10) immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any losses they suffered from April 10, 1989. To the extent, however, that valid reinstatement offers were made to strikers on May 5 and 23 and July 24, 1989, or at any time thereafter, backpay should be terminated on whatever date a striker received a valid offer of reinstatement. Backpay should be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Field Bridge Associates, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) On the cessation of the lockout, refusing to reinstate economic strikers on their unconditional offers to return to work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer reinstatement to all strikers who did not receive such offers on April 10, 1989, to their former positions of employment or, if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Brooklyn, New York, copies of the attached notice marked ''Appendix B.''[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

ORDER

On February 27, 1989 a Consolidated Complaint was issued in these cases by the Regional Director of Region 29 of the National Labor Relations Board. In pertinent part the Complaint alleged that:

1. That Respondent Field Bridge Associates, on July 1, 1987 executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective bargaining agreement of the teller when Field Bridge purchased a group of apartment buildings called the Ebbets Field Housing Complex.

2. That Respondent Field Bridge, on July 1, 1987 commenced operating the Ebbets Field complex retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

3. That Rachel Bridge Corp., on July 1, 1987 executed a contract of sale pursuant to which it, inter alia, agreed to assume the collective bargaining agreement of the seller when Rachel Bridge purchased Washbridge Apartments.

4. That Rachel Bridge Corp., on July 1, 1987 commenced operating the Washbridge Apartments retaining in its employ a majority of the service and maintenance employees and security guards who worked for the seller.

5. That both Respondents were successors and that the Respondents violated Section 8(a)(1) & (5) of the Act when they refused to remit dues and initiation fees and when, after the collective bargaining agreements expired, they unilaterally failed and refused to continue to make payments to the contractually provided Health and Pension Funds.[1]

The Respondents' Answer denies that they assumed the collective bargaining agreements and deny that they are ''successors.'' Further, the Answer asserts a number of affirmative defenses, one of which asserts that even if the Respondents executed agreements assuming the sellers' collective bargaining agreements, the Union by its subsequent acts, repudiated such agreements.

The Charging Party contends that prior to the sale of the Ebbets Field Complex it filed for arbitration in two cases involving the discharge of employees by the former owner. When it learned of the sale to Field Bridge it amended its notice of arbitration to include the new owner. Field Bridge then initiated an action in New York State Supreme Court to stay the arbitrations and those cases were consolidated before the Honorable Ira Gammerman. The action to stay the arbitrations was premised at least in part, on the argument of Field Bridge that it had not assumed the collective bargaining agreement when it purchased the property. In a proceeding where no witnesses were called or were subject to cross examination, Judge Gammerman, on April 26, 1988, issued an oral Decision denying a stay of the arbitration. That Decision was affirmed by a one line Order of the Appellate Division on November 3, 1988. On April 4, 1989 the New York State Court of Appeals denied Field Bridge's request for permission to appeal to that Court.

A similar scenario was played out at the Washbridge Apartments. Thus prior to the sale, the Union sent notices of arbitration to the former owner and amended these after it became aware of the sale to Rachel Bridge. Rachel Bridge also moved in State Court to have the arbitration stayed against it, contending, *inter alia*, that it had not assumed the collective bargaining agreement when it purchased the property. That case was assigned to the Honorable Karla Moskowitz who, after the Appellate Division ruled in the Field Bridge matter, issued an oral decision denying the stay of arbitration. As in the prior case, no witnesses were called or cross examined.

The Charging Party, with whom the General Counsel joins, contends that I should strike Respondents' Answer insofar as it denies that Respondents assumed the collective bargaining agreements. They also argue that I should strike the affirmative defence which contends that the Union repudiated the contracts. The contentions of the Charging Party

[1] As to dues and initiation fees, the Complaint alleges that the Respondents refused to make such payments from July 20, 1987. In the case of Pension and Health payments, the Complaint alleges that the refusals commenced on August 1, 1987. As to all payments, the Complaint alleges that the Respondents continued to refuse to make such payments from December 14, 1987, a date six months prior to the filing of the unfair labor practice charges.

and the General Counsel are premised on the findings in the prior State Court proceedings, and it is argued that those findings are binding on the same issues in this case. Such a contention is not, however, consistent with current Board law inasmuch as the Board was not a party in the State Court proceedings. See *Donna Lee Sportswear Co. Inc.*, 281 NLRB 719 (1986), enfd. denied 127 LRRM 2209 (lst Cir. 1987).

It is my opinion, having carefully reviewed the materials submitted, that the issues raised by the Consolidated Complaint and the Answer are complex as to both law and fact and that they would best be resolved after a full hearing on the issues.[2]

Based on the foregoing, it is Ordered that the Motions by the Charging Party and the General Counsel to strike certain portions of the Respondents' Answer be and they hereby are denied.

[2] I note that the Complaint on its face alleges units which combine guards and non guards. This may or may not, depending on the facts, raise an issue under Section 9(b)(3) of the Act. If so, it certainly was not an issue which was raised or decided in the State Court proceedings.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT, on the cessation of a lockout, refuse to reinstate economic strikers when they unconditionally offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to all strikers who did not receive such offers on April 10, 1989, to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits they may have suffered.

FIELD BRIDGE ASSOCIATES